

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

JANUARY TERM, 1915.

No. 2760 **186**

ANNA CONNOR, APPELLANT,

vs.

WASHINGTON RAILWAY & ELECTRIC COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 5, 1914.

PRINTED DECEMBER 10, 1914.

Court of Appeals of the District of Columbia.

JANUARY TERM, 1915.

No. 2760.

ANNA CONNOR, APPELLANT,

vs.

WASHINGTON RAILWAY & ELECTRIC COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2760.

ANNA CONNOR, Appellant,
vs.
WASHINGTON RAILWAY & ELECTRIC COMPANY, a Corporation,

a Supreme Court of the District of Columbia.

At Law. No. 57177.

ANNA CONNOR, Plaintiff,
vs.
WASHINGTON RAILWAY & ELECTRIC COMPANY, a Corporation,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed August 19, 1914.

In the Supreme Court of the District of Columbia.

Law. No. 57177.

ANNA CONNOR, Plaintiff,
vs.
WASHINGTON RAILWAY & ELECTRIC COMPANY, a Corporation,
Defendant.

The plaintiff, Anna Connor, by her attorneys, sues the Washington Railway & Electric Company, a corporation, and for cause of action states as follows:

At all times in the declaration mentioned the defendant was, and ever since has been, and is now, a body corporate owning, controlling

and operating certain electric railway lines together with its tracks, cars and accessories pertaining thereto, and used and operated in connection therewith, as a common carrier of persons for hire in the City of Washington, District of Columbia; that on to-wit the 11th day of February, 1914, while one of the said cars of defendant was standing motionless at or about the intersection of Columbia Road and Onatrio Road, Northwest, in the said City, for the purpose of receiving passengers, the plaintiff, being then and there at that time present, and desiring to become a passenger thereon, proceeded with due and proper care to mount said car as a passenger thereon. The premises considered it thereby became and was and continued to be the duty of the defendant, its servants and agents, who then and there well knew the premises as stated aforesaid, or with the exercise of due care should have known it, to have permitted and allowed the

2 plaintiff to have safely and completely mounted the said car, and fixed herself in a reasonably safe position therein, and not to have allowed the said car to have been put in motion until the plaintiff had become so completely and safely mounted and fixed therein in a place of reasonable safety thereon; nevertheless, the plaintiff avers, the defendant its servants and agents, on to wit, the day aforesaid, at the place aforesaid while the plaintiff was in the act of mounting the said car being then on the rear platform thereof and proceeding or about to proceed therein with due and proper care to fix herself in a reasonably safe position all of which the defendant, its servants and agents then and there well knew, or with the exercise of due and proper care should have known, did wrongfully and negligently cause, or allow, or permit the said car to be put in motion suddenly, without any warning whatever to the plaintiff, thereby causing her to be thrown with great force and violence, to and against some part of the structure of the said car, or machinery thereof, thereby causing divers bruises and contusions to be inflicted upon her body, particularly upon her back, head, and hip, causing her to become sick and disordered permanently, causing her to become permanently lame in her back, spine and hip, and further causing her nervous system to become seriously and permanently impaired, all of which injuries have ever been, and will ever continue to be, attended with suffering upon the part of the plaintiff of great physical pain and mental distress, to the damage of the plaintiff in the sum of \$10,000.

Wherefore the plaintiff brings this suit and claims the sum of \$10,000 besides the costs of this suit.

W. G. GARDINER,
H.,
L. L. HAMBY,
Attorneys for Plaintiff.

3

Demurrer.

Filed September 14, 1914.

* * * * *

Now comes the defendant in the above entitled cause, and says that the declaration filed herein is bad in substance.

GEO. P. HOOVER,
Attorney for Defendant.

The points of law proposed to be presented on the argument of the foregoing demurrer are as follows:

1. That the declaration filed herein does not state a cause of action.

2. That the declaration filed herein does not allege actionable negligence on the part of the defendant.

3. That there was no duty or obligation imposed upon the defendant, under the allegations of the declaration filed herein, not to start the car upon which the plaintiff was a passenger, while she was on the platform, as alleged.

4. That no duty or obligation was imposed upon the defendant to keep the car at a standstill until the plaintiff had left the platform, under the allegations of the defendant filed herein.

5. That the declaration filed herein fails to charge negligence upon the part of the defendant.

Notice.

W. G. Gardiner and L. L. Hamby, Attorneys for Plaintiff:

Please take notice that the foregoing demurrer will be argued on Friday, the ninth day of October, 1914, before one of the Justices of the Supreme Court, holding a Circuit Court, at ten o'clock A. M. or as soon thereafter as counsel may be heard.

GEO. P. HOOVER,
Attorney for Defendant.

4 Service of a copy of the foregoing demurrer acknowledged this 14th day of September 1914.

W. G. GARDINER &
L. L. HAMBY,
M. C.,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, October 9, 1914.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * *

Now come here as well the plaintiff by her Attorneys Messrs. W. G. Gardiner and L. L. Hamby as the defendant by its Attorney

George P. Hoover Esquire; whereupon the demurrer of defendant filed herein to the plaintiff's declaration in this cause coming on to be heard, it is considered that said demurrer be, and the same is hereby sustained.

Thereupon the plaintiff by her said Attorneys in open Court says that she does not care to amend her declaration, but will stand upon the same as originally filed.

Therefore it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day and be for nothing held, and recover against the plaintiff the costs of its defense, to be taxed by the Clerk, and have execution thereof.

The plaintiff by her Attorneys in open Court notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of One hundred dollars (\$100), or, in lieu thereof, a deposit of Fifty dollars (\$50).

5

Memorandum.

October 31, 1914—Appeal bond approved and filed.

Assignments of Error.

Filed November 16, 1914.

* * * * *

I. The court erred in holding that the declaration did not allege any actionable negligence on the part of the defendant.

II. The court erred in holding that it is not negligence for the defendant, or its servants and agents, as alleged in the declaration, to wrongfully and negligently cause, allow or permit the car to be put in motion suddenly, without any warning whatever to the plaintiff, while she was with their knowledge upon the platform thereof, and in the act of proceeding, or about to proceed to fix herself in a reasonably safe position.

III. The court erred in sustaining the defendant's demurrer to the declaration.

W. G. GARDINER,
L. L. HAMBY,
Attorneys for Plaintiff.

Designation of Record.

Filed November 16, 1914.

* * * * *

To the Clerk of the Supreme Court of the District of Columbia:

6 You will please prepare the record on appeal to the Court of Appeals of the District of Columbia in the above entitled cause and include therein the following:

Declaration filed.

Demurrer, filed.

Order sustaining demurrer filed.
Judgment on demurrer and appeal.
Memorandum of appeal bond approved and filed.
Assignment of Error.
This designation.

W. G. GARDINER,
L. L. HAMBY,
Attorneys for Plaintiff.

7 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 6, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 57177 at Law, wherein Anna Connor is Plaintiff and Washington Railway & Electric Company, a Corporation is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 4th day of December, 1914.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2760. Anna Connor, appellant, vs. Washington Railway & Electric Company, a corporation. Court of Appeals, District of Columbia. Filed Dec. 5, 1914. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JAN.--7-1915

Henry W. Hodges.
Chlerk.

IN THE

Court of Appeals of the District of Columbia

JANUARY TERM, 1915.

No. 2760

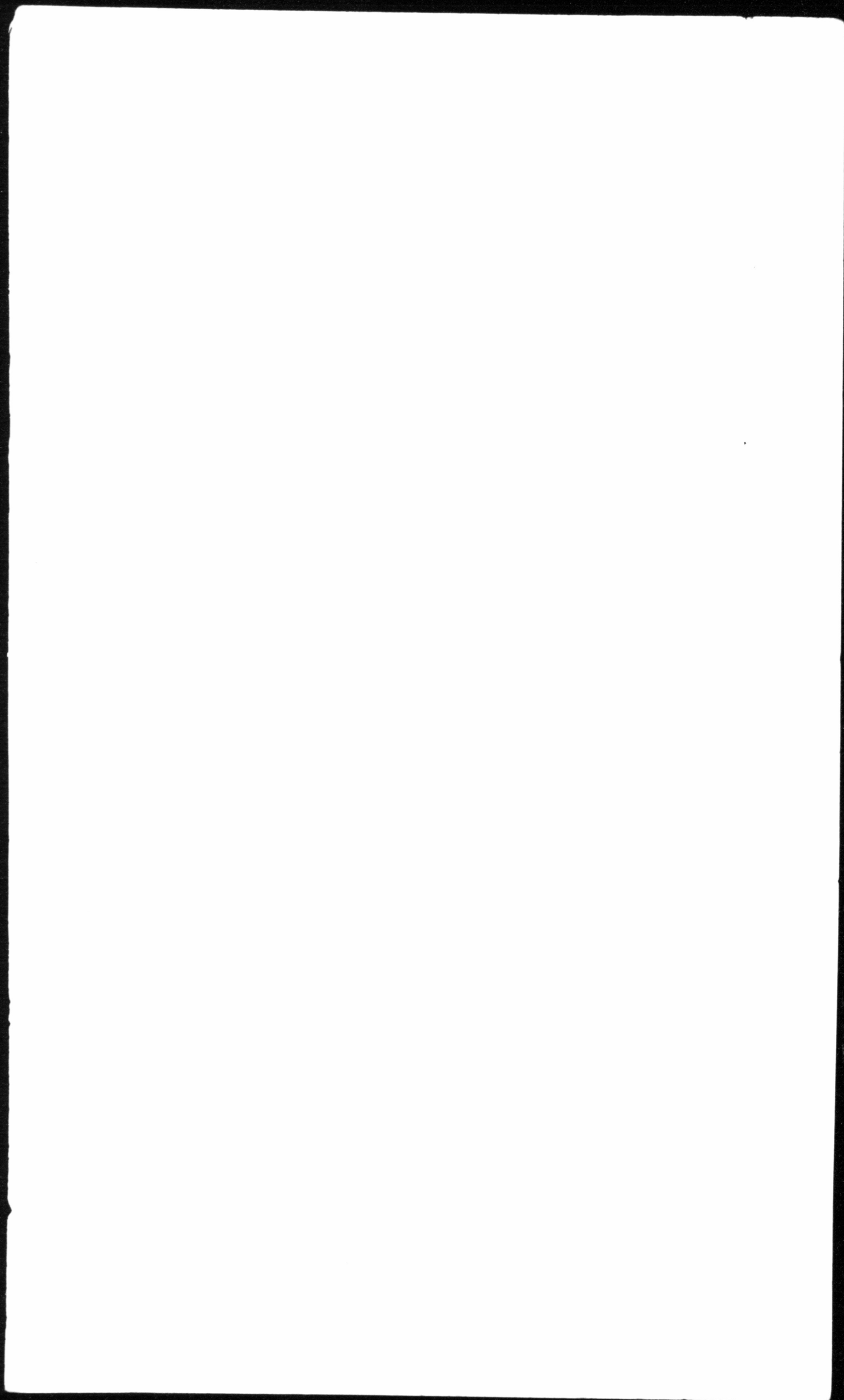
ANNA CONNOR, APPELLANT,

vs.

WASHINGTON RAILWAY AND ELECTRIC CO.,
A CORPORATION, APPELLEE.

BRIEF OF THE APPELLANT

W. GWYNN GARDINER,
L. L. HAMBY,
Attorneys for Appellant.



IN THE
Court of Appeals of the District of Columbia

JANUARY TERM, 1915.

No. 2760

ANNA CONNOR, APPELLANT,

v's.

WASHINGTON RAILWAY AND ELECTRIC CO.,
A CORPORATION, APPELLEE.

BRIEF OF THE APPELLANT

Statement of the Case

This is an appeal from the decision of the lower court in sustaining a demurrer to the declaration. The declaration appears in the record on pages one and two.

Argument

Several assignments of error appear in the record (page 4), but in presenting them to this court we shall treat them as one assignment, to wit, that the court committed error in holding that the declaration did not state a cause of action.

Law Rule 27 states as follows:

"The declaration shall state only the facts necessary to state the cause of action."

In the first place the declaration states as follows:

"While one of the said cars of defendant was standing motionless at or about the intersection of Columbia Road and Ontario Road, Northwest, in the said city, for the purpose of receiving passengers, the plaintiff, being then and there at that time present, and desiring to become a passenger thereon, proceeded with due and proper care to mount said car as a passenger thereon. The premises considered it thereby became and was and continued to be the duty of the defendant, its servants and agents, who then and there well knew the premises as stated aforesaid, or with the exercise of due care should have known it, to have *permitted and allowed the plaintiff to have safely and completely mounted the said car and fixed herself in a reasonably safe position therein, and not to have allowed the said car to have been put in motion until the plaintiff had become so completely and safely mounted and fixed therein in a place of reasonable safety thereon*; nevertheless, the plaintiff avers the defendant, its servants and agents, on to wit, the day aforesaid, at the place aforesaid, while the plaintiff was in the act of mounting the said car, being

then on the rear platform thereof, and proceeding or about to proceed therein with due and proper care to fix herself in a reasonably safe position, all of which the defendant, its servants and agents, then and there well knew, or with the exercise of due and proper care should have known, *did wrongfully and negligently cause or allow, or permit the said car to be put in motion suddenly, without any warning whatever to the plaintiff, thereby causing her to be thrown with great force and violence,*" and so forth.

We respectfully submit that this constitutes a good cause of action against the defendant, and it seems to us that this identical question has been before this court, and that this court has decided in favor of the position of the appellant in this case.

For authority on this point we cite the case of Railroad Company *vs.* Klein, 8 App., D. C., 75. In this case the identical question was before the court, and Mr. Chief Justice Shepard, in his opinion on page 81, says:

"We come now to the consideration of alleged errors committed in giving and refusing instructions to the jury. * * * The only witness who testified to the occurrence of the accident and the attendant circumstances thereof, was the plaintiff himself, and the verdict of the jury affirms the truth of his testimony. He said that he signalled the car in order to take passage; that the conductor saw him and caused the car to be brought to a stop that he might enter; that encumbered by his sample case, he stepped upon the footboard, took hold with his left hand of the handle provided for the purpose, and attempted to enter and take a seat; before entering and before he had reasonable time to do so, the conductor gave the signal to start; the car

started *suddenly* and thereby caused the plaintiff to fall to the ground; that he was guilty of no negligence and the accident was not contributed to by any fault of his. When hailed, it was the duty of the conductor to stop the car for the plaintiff to enter. Having done this, it was his duty to hold the car and not permit it to start until plaintiff had, at least, reasonable time to take a safe position *inside*. A failure to perform his duty constituted negligence, and the court did not err in so charging the jury."

This case is also an important one, because the declaration in the Klein case alleged that the car started *suddenly*, and thereby caused the plaintiff to fall to the ground. In the case at bar we allege that they did wrongfully and negligently cause or allow, or permit the said car to be put in motion *suddenly*. The identical allegation and the identical legal question decided by this court in favor of our contention.

In dealing with the question of the duty of a railroad company waiting until a passenger had reached a place of safety before starting the car, Thompson, on "Negligence," says (3 Thompson on Negligence, Section 3515):

"Many of the cases cited in the preceding paragraph of this chapter emphasize the duty of the street railway company not to start its car with a sudden motion before passengers who have boarded the car have had time to get securely seated.

* * * These decisions emphasize the doctrine that for those in charge of a street car to start it suddenly while a passenger, especially a woman, is endeavoring to secure a seat, is evidence of negligence to take the question to a jury. It has been held that a street railway company is liable for injuries thus visited upon a passenger where *human care and foresight* could have prevented

the injury, although it is necessary to start the car before passengers reach their seats in order to reach the destination at the time demanded and promised."

The New York Court of Appeals, in considering this identical question in the case of *Dochterman vs. Railway Company*, 52 N. Y. Sup., 1051, and confirmed that opinion in 164 N. Y., 586, says:

"While the construction and method of propulsion of a surface car are such as to involve a serious jerk in starting, a jury would be warranted in inferring want of ordinary care in its operation, from the fact that a woman passenger was thrown to the floor and injured, through the starting of the car before she was able to reach a seat."

The Court of Appeals of Missouri, in passing upon this identical question in the case of *Dougherty vs. Missouri Pacific Railway Company*, 9 Mo. App., 478, says:

"A carrier of passengers by street cars must either wait a reasonable time for the passenger to be seated or must start the car with a gradual motion. When the car is started with an unusual jerk which throws the passengers against the car window and lacerates his hand before he has time to be seated, and it appears that by the proper use of the reins and brake the car could be started without any jerk, this makes a *prima facie* case of negligence against the carrier."

In the same case the Missouri court, in 81 Mo., 325, the case being before the court on the second appeal, said:

"So here the natural presumption is that the car started suddenly forward—it was put in motion by the driver who had control of the motive power; and

in the absence of proof that the movement was produced by some extraordinary cause not within the control of the driver or which he could have not prevented by the exercise of due care and vigilance, the plaintiff was entitled to a verdict.

"With respect to the obligation of the defendant to the plaintiff as a passenger, it is sufficient to say that while it is not an insurer of safety of passengers, it is bound by its office as such carrier to exercise due care and vigilance so as to safely transport them. It must allow reasonable time for passengers to enter and take a seat, if there be one, or reasonable time to seize the straps furnished for passengers when standing; and while it may start its car before the passenger has had time to take a seat or secure his hold on the strap, it must exercise the utmost care in starting, so as not to jar or upset him."

For further authority on this point we quote the case of *Benjamin vs. Met. Street Railway Co.*, 245 Mo., 598. The court, on page 607 of its opinion, says:

"If the plaintiff's story is true, the question of whether the conductor in starting the car as and when he did, exercised that high degree of care that devolved on him, to secure the safety of his passengers, was one which should have been submitted to the jury under proper instructions."

The sustaining of the demurrer in this case would, we submit, establish as a matter of law that while a person—a woman—is proceeding to board a car, standing motionless, and which had stopped to take her as a passenger, and while she, so proceeding, being on the platform thereof, about to proceed to a place of reasonable safety, with the knowledge of these facts by the defendant, the latter can, without any

warning to her, cause the car to be put in motion *suddenly*, thereby causing her to fall violently against some part of the machinery thereof, and to become seriously injured, and in the doing of these things be immune from liability to her for the injuries which she has sustained. This seems to be a clear statement of what the declaration alleges, and it seems to us to be couched in plain, unambiguous terms, so that their meaning could be unmistakable in the mind of any person of ordinary understanding and intelligence, taking them in their ordinary significance, or construing them, if you please, in their literal or strict meaning, the sense conveyed being exactly the same in either case; and we do not think that the jury or the trial justice would have any difficulty in understanding what it means. In addition, if the demurrer be finally sustained it would establish, as the law, that any platform under the circumstances alleged is a safe place, and thus the province of the jury would be usurped.

Something was said in the lower court by opposing counsel that it was necessary to start a car suddenly in order to start it. We submit that we alleged that he did wrongfully and negligently cause, or allow, or permit, the said car to be put in motion suddenly. In other words, that he negligently and wrongfully put the car in sudden motion. We find that this allegation is like the allegation that was before the court in the case of the Metropolitan R. R. Co. *vs.* Jones, 1 App. D. C., page 200. In an opinion by Mr. Chief Justice Shepard, in treating this allegation of the declaration, on page 203 of his opinion, says:

“The allegation of the declaration in this case is, that ‘the driver and conductor so carelessly, negligently and unskilfully drove and managed said car that afterwards, and whilst the said plaintiff was in the act of alighting from and leaving said

car, which had stopped for that purpose, etc.,
 * * * she using at the time proper care and caution, and without any negligence or carelessness on her part, by and through the mere carelessness, negligence, unskilfulness and misconduct of the said driver and conductor, and without any warning to the said plaintiff, said car was suddenly started and put in motion, whereby the said plaintiff was violently thrown to the ground."

The court will observe that the allegations in this case are the same as the allegations in the case at bar.

The question was before the Federal court in the case of *Gulf C. & F. Ry. vs. Washington*, 49 Fed., 347-9, and in that case the court said:

"It is very well settled that a general allegation of negligence without stating the particular acts which constitute the negligence is good against a general demurrer."

Again in the case of *Terre Haute I & E. Traction Co. vs. Marberry*, 100 N. E. Reporter, 401-3, an Indiana case, the court said:

"In the absence of a motion to make more specific a complaint stating decedent's injury and alleging that it was caused as a consequence, and solely by reason, of defendant's negligence, sufficiently charges actionable negligence."

The question was before the West Virginia court in the case of *Hains vs. Parkersburg Ry. Co.*, 76 S. E. Reporter, 843, in which case the court said:

"The office of a declaration is to give the defendant notice of the nature and ground of the

action, and the rules of pleading do not require such specification of matters of detail as will benefit the defendant only by the hamper and weight of procedure imposed upon the plaintiff."

Again, this question was before the court of Florida in the case of *Coombs vs. Rice*, 59 S. Reports, 958, in which case the court said:

"In an action for a negligent injury to persons or property it is in general necessary to allege only ultimate facts showing the relation between the parties out of which the duty to avoid the negligence arises under the law and the act or omission that proximately caused the injury, coupled with an allegation that such act or omission was negligently done or omitted."

This same question was before the Missouri court in the case of *Wylar vs. Ratican*, reported in 150 Mo. App., page 474, in which the court said:

"In an action based upon negligence, a petition which described the act complained of with reasonable certainty and sufficient clearness as to advise the defendant of the charge he is to meet and avers generally that such act was negligently done, is sufficient."

This question was before the New York court in the case of *Hicks vs. Serano*, 133 N. Y. Sup., 1102, in which case the court said:

"An allegation that defendant so carelessly controlled his automobile that it was propelled against plaintiff's autocar, whereby the latter was damaged, is sufficient without a statement in what particulars the defendant was careless in the management of

his car, whether he drove too fast or too close to plaintiff's car, or swerved."

"An allegation of the act committed or omitted, with the charge that it was negligently and carelessly done or omitted is sufficient."

This question was before the court of Indiana in the case of Indianapolis Traction Company *vs.* Newly Adm., 45 Ind. App., 540, in which case the court said:

"The test of the sufficiency of a complaint is whether a person of ordinary understanding can know what was intended thereby, and not whether an extraordinary acute mind can distort the meaning into something different."

Again, the same question was before the California court in the case of Rathburn *vs.* White, 107 Pac., 309, in which the court said:

"It is sufficient to charge negligence by the general averment that defendant negligently did the act which resulted in the damage complained of."

Again, in Stephenson *vs.* S. P., 102 Cal., 143-7, the court in its opinion said:

"The term 'negligence' for the purpose of pleading is a fact to be pleaded—an ultimate fact which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the acts and makes it a legal wrong. The absence of care in doing an act which produces injury to another is actionable. The term 'negligence' signifies and stands for the absence of care. 'Negligence' is the ultimate fact to be pleaded and it forms part of the act from which an injury arises; it is the absence of care in the performance of the act and is not merely the result of such ab-

sence, but the absence itself, and it is not, therefore, a mere conclusion of law and may be pleaded generally. As a result of the application of these principles to code pleading in cases of negligence and of others of kindred character, it is held in this State and in nearly all of the United States that it is sufficient to allege the negligence in general terms, specifying, however, the particular act to have been negligently done."

Again, in the case of *Dieter vs. Tharen*, 81 Mo. App., 612-4, the court said:

"In an action based on negligence, a petition that describes the act complained of with sufficient clearness to advise the defendant of the charge he is to meet and then avers generally that such acts were negligently done, is sufficient."

Again, the Florida court stated in the cases of *A. C. L. vs. Beasley*, 45 Southern Rep., 761; *S. A. L. vs. Rentz*, 54 Southern Rep., 13, and the case of *Jacksonville Electric Co. vs. Schmetzerk*, 43 Southern Rep., 85:

"In an action when negligence is the basis of recovery, it is not necessary for the declaration to set out facts constituting the negligence; but an allegation of sufficient acts causing injury coupled with an averment that they were negligently done, will be considered sufficient."

Again, in 14 Encl. of Pleading and Practice, 333, on this same question, the author says:

"The rule is well-nigh universal that, in an action for negligence the plaintiff need not set out in detail the specific acts constituting the negligence complained of, as this would be pleading the evidence."

"A general averment of negligence in the particular act complained of, resulting in damages, is good, at least as against a general demurrer.

"Accordingly, a declaration specifying the act the commission or omission of which caused the injury, and averring that it was negligently and carelessly done or omitted, will suffice."

Again, on page 341, the author says :

"A demurrer for want of facts will not lie to a complaint alleging negligence in general terms, the defendant's remedy in such case being a motion to make the complaint more definite and certain."

Again, in 20 Enc. Pleading and Practice, the author says :

"The weight of authority being that general allegations of negligence are sufficient on demurrer and petition in error, the proper method of obtaining a statement of the grounds of negligence is by a motion to make the complaint more definite and certain."

Again, in 29 Cyc., on page 570, the author says :

"While there is not entire harmony in the adjudicated cases as to the proper method of pleading negligence, the rule sustained by the weight of authority is that, negligence being the ultimate fact to be pleaded and not a mere conclusion of law, a declaration or complaint charging defendant with an act injurious to plaintiff, with a general allegation of negligence in the performance of the act, is sufficient, at least against a demurrer for want of sufficient facts, without stating the details or particulars of the acts causing the injury, unless the particular acts alleged are such that they could not be negligent under any possible state of facts or

circumstances provable under the allegation of the complaint, or the contrary appears from the facts pleaded."

We also cite the following authorities on this point:

L. & N. R. R. Co. *vs.* Wolfe, 80 Ky., 82.
 Hill *vs.* N. Pac. Ry. Co., 49 Mo. App., 520.
 Kennedy *vs.* Hankin 102 Pac., 733.
 McLeod *vs.* Ry. Co. 117 Pac. Rep., 749.
 Jones *vs.* Grt. Northern Ry. 97 N. W., 535.
 Brailey *vs.* Ry. Co., 66 W. Va., 462-5.

This being a general demurrer, if a cause of ~~motion~~^{action} is stated the demurrer will not lie, and we respectfully submit that a cause of action is pleaded, and that the ruling of the lower court should be reversed and the demurrer overruled.

Respectfully submitted.

W. GWYNN GARDINER,
 L. L. HAMBY,
Attorneys for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

FEB. 1--1915

Henry W. Hodges.
Clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1915.

No. 2760.

ANNA CONNOR, APPELLANT,

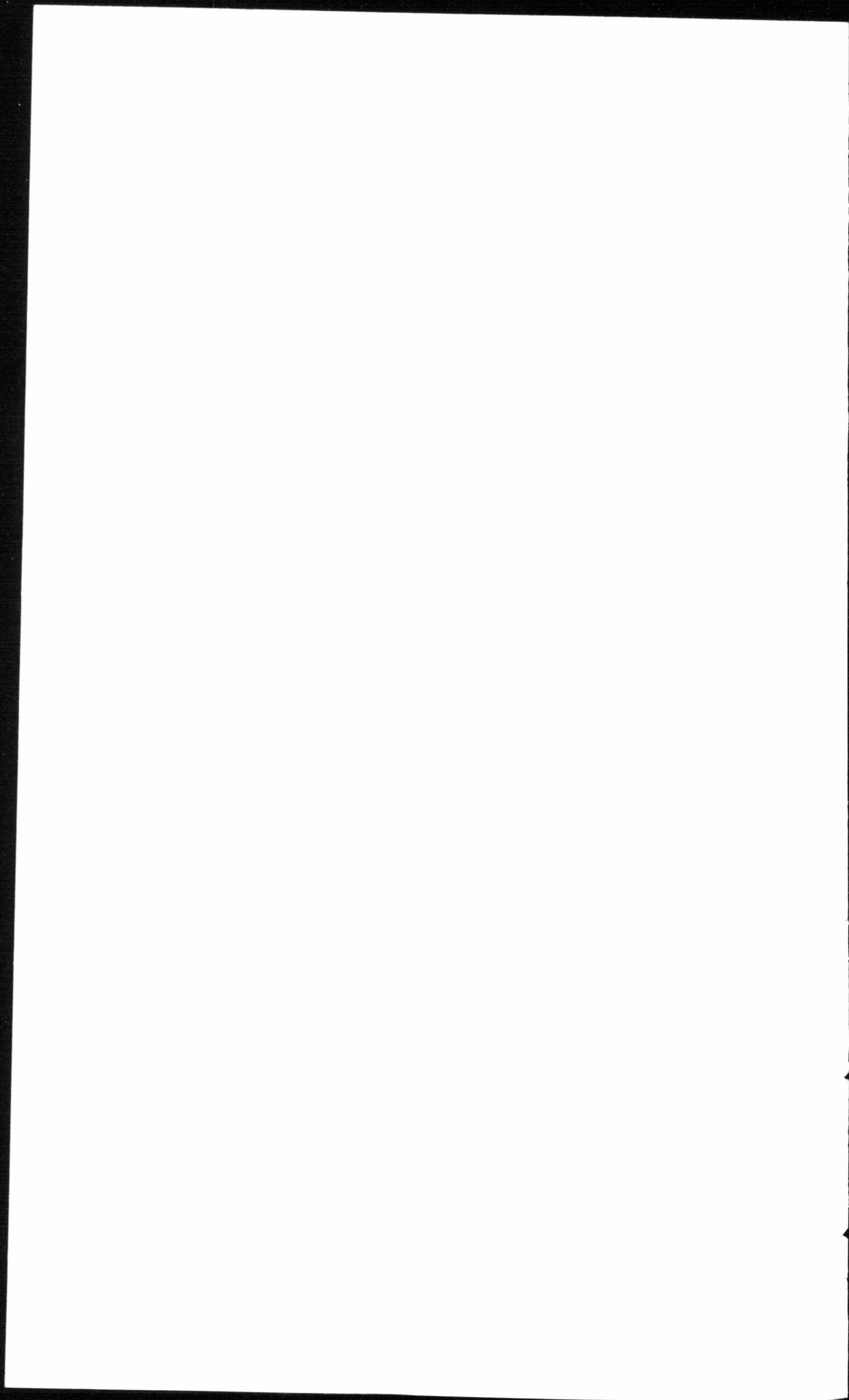
vs.

WASHINGTON RAILWAY & ELECTRIC COM-
PANY (A CORPORATION), APPELLEE.

BRIEF ON BEHALF OF THE APPELLEE.

GEO. P. HOOVER,

Attorney for Appellee.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1915.

No. 2760.

ANNA CONNOR, APPELLANT,

vs.

WASHINGTON RAILWAY & ELECTRIC COMPANY (A CORPORATION), APPELLEE.

BRIEF ON BEHALF OF THE APPELLEE.

Statement of the Case.

In this case the appellant filed her declaration in the court below. To the declaration the appellee filed a demurrer, based principally on the ground that the declaration did not state a cause of action, and that upon the allegations of the declarations it was not negligence for the appellee to start the car upon which the appellant was a passenger before she had left the platform and entered the car (Rec., p. 3).

Upon hearing, the court sustained the demurrer. The appellant elected to stand on the demurrer, judgment was entered thereon, and the appellant appealed to this court.

The declaration filed in this case recites that the ap-

pellant was a passenger on a car of the appellee, just having boarded the same, and after reciting the duty imposed upon the appellee in the premises, contains the following allegation of negligence on the part of the appellee:

“Nevertheless the plaintiff avers, the defendant, its servants and agents, on, to wit, the day aforesaid, at the place aforesaid, while the plaintiff was in the act of mounting the said car, being then on the rear platform thereof, and proceeding or about to proceed therein with due and proper care to fix herself in a reasonably safe position, all of which the defendant, its servants and agents then and there well knew, or with the exercise of due and proper care should have known, did wrongfully and negligently cause, or allow, or permit the said car to be put in motion suddenly, without any warning whatever to the plaintiff, thereby causing her to be thrown with great force and violence, to and against some part of the structure of the said car, or machinery thereof,” thereby causing the injuries complained of.

ARGUMENT.

It will be observed upon careful reading of this declaration that it simply charges that while the appellant was boarding the car, and after she was upon the rear platform, the defendant suddenly put the car in motion. It is not alleged in the declaration that the defendant's servants started the car in any improper or unusual manner, or that there was any jerk or jar of the car, but the allegation is simply that the car was suddenly started. There is no allegation in the declaration that the appellant was aged, infirm, crippled, or in any way abnormal, and unable to properly take care of herself in entering the car.

It is contended by the appellee that the allegations of this declaration do not charge any negligence on its part; that the appellee, under the allegations of the declaration, was not required to keep the car at a standstill after the appellant had reached a position on the platform thereof, and that it did not constitute negligence for the servants of the appellee to start the car while she was in this position, unless the car was started in such manner as to cause an unusual or extraordinary jerk or jar, or unless there was something in the appearance of the appellant to indicate that she was suffering from some abnormality, and consequently was entitled to a greater degree of care than would be required as to the ordinary passenger, or that by reason of age or infirmity a greater degree of care should have been exercised by the servants of the defendant for her protection. If either of these conditions existed it was incumbent upon the pleader to charge these facts in the declaration.

In the absence of allegations of this character in the declaration, it is clearly the established law that the appellee could not be guilty of negligence in starting the car while the passenger was on the platform, and before she had either entered the car or been allowed a reasonable opportunity to take a seat in the car. This view of the law has been announced in a number of well-considered cases.

In the case of *Howard vs. Louisville Railway Company*, 105 S. W. Rep. (Ky.), 932, the cause of action was based upon the claim by the plaintiff that as she was going in the door of the car from the platform, or immediately after she had stepped inside, the car was started with a violent jerk, causing her to be thrown against one of the seats. Upon the trial of the cause the court instructed the jury, at the request of the defendant, that it was not the duty of the agent of the defendant to keep the car standing until the plaintiff was seated. Upon appeal by the

plaintiff from the judgment in favor of the defendant, the court, in affirming the judgment, said (page 934):

"This instruction is taken from *Bennett vs. Louisville Railway Company*, 90 S. W., 1052. In that case the plaintiff, Bennett, alleged in substance that the motorman stopped the car for her, and as she entered the door of the car and was in the act of taking a seat the motorman negligently turned on the current and started the car with a sudden and unusual jerk, by which she was thrown with great force and violence against the edge or end of a seat. The striking similarity between the facts of that case and this will be noticed at a glance, and the instruction being the same as the one approved in the Bennett case, the court properly submitted it as presenting a correct statement of the law upon the point under consideration. As aptly said in the Bennett case: 'It would be impracticable to require in every instance those in charge of a street car to have it remain still until every passenger that boards it takes a seat. This would make street car travel slow and vexatious, and inconvenient.' Upon a reconsideration of the instruction we believe it to be a fair statement of the law, and adhere to it."

In the case of *Sauvan vs. Citizens' Electric Railway Company*, 83 N. E. Rep. (Mass.), 405, the plaintiff was injured by the alleged negligence of the defendant in starting the car before she had reached a point inside. The court, among other instructions, charged that the defendant was under no obligation to the plaintiff as a passenger to hold its car standing until she had seated herself in the car. The court, in its opinion, at page 406, said:

"What she complains of is that the starting bell was rung while she had one foot on the floor of the car, had thrown her weight onto that foot, and was in the act of bringing the other foot up

and forward. Her contention is that on this evidence the jury could have found that the conductor, in giving the signal to start the car when he did, did not use the care which is owed by a common carrier to one of its passengers.

"If the starting signal was given when the plaintiff contends that it was given, it seems hardly possible that the car could have started before the second foot had reached the car floor, or at any rate it might well be contended that the conductor could not have anticipated an instantaneous response to his signal. But apart from that, it is settled in this Commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car. *Weeks vs. Boston Elevated Rwy. Co.*, 190 Mass., 563."

In the case of *Bennett vs. Louisville Railway Company*, 90 S. W. Rep. (Ky.), 1052, 1053, the court said:

"It would be impracticable to require in every instance those in charge of a street car to have it remain still until every passenger that boards it takes a seat. This would make street car travel slow, vexatious, and inconvenient.

"There are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled or in any condition which makes it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection. But the case at bar does not come within this rule. It is true that she was proven to be large and fleshy, but there was no proof that her flesh was any great burden to her, nor was there anything proven which might have indicated to the motorman in charge of the car that any extra precautions were required on his part for her safety."

In the case of *Weeks vs. Boston Elevated Railway Company*, 190 Mass., 563, plaintiff's intestate, in company with her sister, boarded a car of the defendant, and while plaintiff's intestate was inside of the car it was claimed that the car started with a violent and unusual jerk, which threw her backwards upon the floor of the car. The court in that case, at page 566, said:

"The woman was well inside the car, was proceeding to her seat in the usual way, and we do not think that the conductor was under any obligation to wait until she had become seated before giving the signal to start, nor was he bound to notify her that he was about to give the signal."

In the case of *Illinois Central Railroad Company vs. Ball*, 150 Ky., 531, the plaintiff boarded a train of the defendant, and it was claimed that while she was on the top step of the outside platform of the coach the train was started and she was thrown down. The court, at page 534, said:

"The rule defining the duty of the carrier to the passenger, in cases like the one under consideration, is this: In ordinary cases the conductor is not required to either see that the passenger has reached a seat, or to delay starting his train until after the passenger is safely within the car; but as soon as the passenger has fairly entered the car the carrier may start without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of a passenger who is old, feeble, crippled, or in any condition which makes it reasonably apparent to those in charge of the car that the passenger needs unusual care and precaution for his protection." (Cases cited.)

It is true that the foregoing case is one which arose concerning an accident on a steam railroad train; never-

theless the court cites cases in which the accidents happened on street railway cars, and adheres to the rule laid down in those cases.

In the case of *Samuels vs. Louisville Railway Co.*, 151 Ky, 90, the plaintiff was boarding a street car of the defendant and claimed that the car started before she had a reasonable opportunity to get safely aboard, and that she was thrown against a portion of the car and injured. The court in drawing a distinction between the classes of cases where the passenger is on the step when the car starts, and those where the passenger is on the platform, said, at page 94:

“If a car be moved while a passenger is upon the steps of the car, and before he has had a reasonable opportunity to reach the platform, and he is thereby injured, he is entitled to recover, whether the car is moved by an ordinary and usual, or an unusual and unnecessary jerk. The negligence consists in the mere act of moving the car before the passenger has had a reasonable opportunity to board it (cases cited). On the other hand, where the passenger has had an opportunity to reach the platform of the car, the company is not liable unless the car is started with an unusual jerk, except in those cases where the passenger is old, feeble, crippled, or in a condition which makes it reasonably apparent to those in charge of the car that he needs unusual care and precaution for his protection (cases cited). If, therefore, plaintiff had pleaded that the car was started before she had a reasonable opportunity to board the same or had pleaded facts showing that she was entitled to unusual care and precaution, her complaint of the instruction would be well founded. Such, however, is not the case. She alleges that she was injured ‘before she had been given a reasonable oppor-

tunity to fully board and enter said car.' Under the rule that a pleading must be construed most strongly against the pleader, this was simply an allegation that she was injured before she had been given an opportunity to enter the car. We, therefore, conclude that the instruction complained of is not erroneous when considered in the light of the averments of the petition and the evidence introduced by the plaintiff."

In the case of *Saunders vs. Boston Elevated Railway Company*, 103 N. E. Rep. (Mass.), 779, the court said:

"The plaintiff was a robust, healthy, unmarried woman, and 37 years old at the time of the accident. She had her left foot on the floor of the body of the car, resting her weight on it, and was in the act of raising her right foot from the vestibule floor, when the conductor gave the starting signal. That it was not negligence on the part to start the car when he did is settled by the similar case of *Sauvan vs. Citizens' Electric Railway Co.*, 197 Mass., 177."

In the case of *Martin vs. Boston Elevated Railway Co.*, 103 N. E. Rep. (Mass.), 828, the plaintiff, a woman, boarded a car of the defendant, and after being on the platform, but before she had time to enter the door, the car was suddenly started and she was thrown in the vestibule of the car.

The court, at page 829, said:

"It is settled law in this Commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car (cases cited). In reaching that conclusion the court recognized not only the imperative demand by the public for rapid transit, but the fact known to

experience, that ordinarily it is not necessary for the safety of a passenger in normal physical condition that the car should be delayed until he is seated."

In *Benoit vs. B. & N. Street Railway Company*, 103 N. E. Rep. (Mass.), 830, which was a case where the plaintiff, a woman, was thrown to the floor of the defendant's car, by the alleged negligence of the defendant in starting the car too soon, the court said:

"When a car has been stopped for the purpose of taking on a passenger, it is the duty of the conductor not to give the starting signal until the passenger has gotten into such a position on the car as to make it safe to start. This does not mean that he must wait until all the passengers have been seated. Such an application of the carrier's duty would be impracticable under the demands of present day rapid transportation, and it is not necessary for the passengers' safety, according to general experience.

"It is settled law in this commonwealth that under ordinary circumstances it is not negligence for the conductor to give the starting signal before the passenger is fully and fairly on the car." (Cases cited.)

In the case of *Boston Elevated Railway Company vs. Smith*, 168 Fed. Rep. (U. S. District Court, Mass.), 628, the plaintiff, a woman, boarded a car of the defendant; after she had mounted the platform and was about to enter the car door, with her umbrella in one hand, and holding her dress with the other, she claimed the car started with a sudden jerk and threw her to the floor. The court, in holding that the case came within the rule laid down by the Massachusetts court, said, at page 631:

"It is well understood by persons accustomed to riding on electric cars that the cars are liable to start with more or less of a sudden movement

or jerk. Since this is one of the known and common incidents of traveling by this mode of conveyance, the ordinary passenger may be said to assume this risk. He expects that the car may start with a greater or less degree of jerk and realizes that he must exercise due care to protect himself against such a movement. The mere fact, therefore, that the car started with a sudden movement or jerk, and that the plaintiff was hurt, does not make out a case of negligence in the manner of starting the car, but the proof must go further and show that the start was unusually sudden or violent."

The opinion in this case reviews a great number of decisions of the Supreme Judicial Court of Massachusetts.

In the case of *Otinger vs. Detroit United Railway*, 166 Mich., 106, the plaintiff, a woman, boarded a car of the defendant, and while she was inside the car, was thrown to the floor by reason of an alleged jerk of the car when it was suddenly stopped. There was a directed verdict in favor of the defendant, and on appeal, the judgment was affirmed. The court in this case reviews the decisions of the various state courts, and in its opinion says (page 107):

"The general rule adopted by the courts is that street railway companies are not required to defer starting cars until all passengers are seated, and that a train or street car 'may be started without waiting for a passenger to reach a seat after entering the vehicle, unless there is some special and apparent reason to the contrary.' " (Cases cited.)

In the case of *Herbich vs. North Jersey Street Railway Company*, 65 N. J. L., 381, the plaintiff, a child, accompanied by its mother, was thrown to the floor of the car after entering, but before she had been afforded an op-

portunity to take a seat. Upon the trial of the case the defendant requested the court to charge:

"The starting of a car before a passenger is seated is not negligence," which request was refused, and on appeal, the Appellate Court held that it was error to refuse to grant the charge requested.

In the case of *Sharp vs. N. O. City Railway Company*, 111 La., 395, the plaintiff, a man of 70 years of age, weighing 220 pounds, hailed a car of the defendant; the car stopped, and the plaintiff claimed that before he had gained a secure foothold on the car, while he had one foot on the platform and was lifting the other foot from the step, the car was started.

The defendant claimed that the plaintiff was on the platform and in the act of stepping into the doorway when he fell. The court, at page 396, in disposing of the contentions of the parties, said:

"If the car was started before plaintiff had gained a secure footing on the platform, the defendant company was negligent, and is responsible. (Cases cited.) On the other hand, if plaintiff was on the platform and about to enter the doorway, the defendant is not responsible; for it is not charged in the petition, and it is not shown, that the movement of the car either in starting or getting under way was negligent, or out of the ordinary; and certainly it is not necessary to wait until the passenger has taken his seat or even has entered the doorway, before starting a car. Such a rule would preclude the carrying of passengers on the platform, and would materially affect the expeditious operation of the cars; and to no purpose, since experience shows that the contrary practice is not usually attended with any danger. It has been decided that street cars need not wait until passengers are seated before starting. *Herbich vs. New Jersey Street Railway Company*, 65 N. J. L., 381."

A careful analysis of the allegations of negligence in this declaration will disclose that it simply avers, that while appellant was on the rear platform of the car and proceeding, or about to proceed therein, the appellee negligently caused, allowed, or permitted, the said car to be put in motion suddenly, without warning to the appellant. Under the principles of law established by the foregoing authorities, dealing with the duty of the carrier towards its passengers, there was no duty or obligation upon the part of the appellee to keep the car at a standstill until the plaintiff had proceeded from the platform of the car to the inside thereof. It was not an act of negligence, therefore, to start the car before the appellant had left the platform and gone inside, unless the plaintiff either by reason of advanced age, infirmity, or some cripple condition, apparent to the servant of the defendant in charge of the car, was unable to properly take care of herself, and thereby imposed upon the servants of the defendant a greater degree of care for her protection. There is no allegation of any such condition in this declaration, and if such condition did exist it was incumbent upon the pleader to properly aver this in the declaration, so as to take the case out of the general rule upon the subject.

The only allegation of negligence contained in the declaration is that the appellee allowed or permitted the car to be put in motion suddenly. It is not alleged that the car was started in any unusual manner, or that there was any unusual jerk or jar of the car in starting. The term "suddenly" in its ordinary acceptation, as used in this connection must be taken to mean a happening without notice, or an unexpected coming. It is a well-known fact, of which all members of the travelling public must surely

take notice, that the car must start after the passengers have boarded it, and it is not incumbent upon the servant of the appellee to give notice to the appellant that the car was going to start. It surely can not be successfully contended that after passengers have reached a position on the platform of the car, and while they are in the act of entering the car, it is the duty of the conductor to call out to them that the car is going to start. Such a proceeding upon the part of the conductor would be a wholly unnecessary and a nugatory act, because every person who takes passage upon street cars certainly knows that the car is bound to start after the passengers have boarded it, in order to transport the travelling public to their destination. The only duty resting upon the appellee under such circumstances, is that the car must not be started in a negligent manner so as to cause an unnecessary or unusual movement of the car, thereby producing jerks or jars so as to disturb the equilibrium of persons riding thereon. If it were necessary in all circumstances, for the operatives of street cars to keep the cars at a standstill until all the passengers had proceeded from the platform of the cars to the inside thereof, modern transportation would be seriously impaired, and the conveniences of the general travelling public would be greatly interfered with. As has been so well said in the cases cited, if it was incumbent upon operatives of street cars to have the car remain at a standstill until every passenger had proceeded to the inside thereof or taken a seat, street car travel would be made slow, vexatious, and inconvenient.

Cases Cited by the Appellant.

The appellant in this case, to a large extent, relies upon the decision of this court in the case of *Anacostia & Potomac River Railroad Company vs. Klein*, 8 App. D. C., 75.

Upon an examination of that case it will readily be seen that the facts upon which the decision was based are so different from the allegations contained in the declaration in the case at bar that the rule of law laid down in that case is clearly inapplicable to the present case. In the *Klein* case the evidence showed that the plaintiff signalled a car to stop; that the car stopped in response to his signal; thereupon the plaintiff, who was encumbered with a sample case about two feet long and two feet wide, weighing about seven or eight pounds, undertook to board the car; the car in question was what is commonly known as a "summer car," with a footboard running the length of the car; that when the plaintiff got on the footboard, and had his left hand on the side of the car, putting his left foot on the board and taking hold of the handle of the upright, the car started, and he was thrown from the car and dragged a considerable distance along the street. The court decided that on the evidence, the servant of the defendant was guilty of negligence in starting the car before the plaintiff had a reasonable opportunity to board it.

Counsel for the appellee does not contend for one moment that the facts set out in the *Klein* case do not constitute negligence, if uncontradicted. The allegations of this declaration do not set up a case where the appellant was not afforded a reasonable opportunity to board the car. On the contrary the declaration clearly states that the appellant had reached a position on the platform of the car, and the appellee was not bound to hold the car at a standstill until she could leave the platform

and take a seat inside the car. The only duty resting upon the appellee was that of not starting the car with an unusual or unnecessary jerk so as to cause the appellant to fall.

On the brief of the appellant is cited section 3515 of the 3d Volume of Thompson on Negligence. This textbook was published in 1902, and the only cases cited in support of the text are those in *Dochtermann vs. Railway Company*, 32 Appellate Division (N. Y., 13), and *Dougherty vs. Railway Company*, 9 Mo. App., 478. In the supplemental edition, volume 8, Thompson on Negligence, section 3515, published in 1912, the text writer, in referring to the duty of a street railway company, in respect to the starting of its cars while passengers are boarding, states:

“It is not the duty of the operatives of a street car to keep the car stationary until a passenger has seated himself unless he is a cripple, and a passenger injured while in the act of taking his seat in consequence of the starting of the car, can not recover unless the car was recklessly started.”

Even if it be assumed that the law was, as stated in the earlier edition of the textbook, nevertheless it is perfectly apparent that the later edition states the law as it is today. This later enunciation in the text is but a statement of the principles of law as laid down by the great weight of authority upon the subject.

Upon examination of the case, *Dochtermann vs. Railway*, 52d N. Y., Supplement 1051, which is cited in support of the earlier text, it will be observed that the court in the decision of this case was divided three to two, and it is respectfully submitted that the dissenting opinion delivered by the presiding justice in that case is so clear and forceful that we must be impressed with the logic of the opinion and the reasoning therein contained.

This dissenting opinion reviews at length the decisions of the Court of Appeals of New York, and the opinion there delivered is clearly sustained by the later cases upon the subject.

The case of *Benjamin vs. Railway Company*, 245 Mo., 548, was an action in which a woman, about 57 years of age, weighing 190 pounds, undertook to board a car of the defendant; that while she was on the step, with one foot on the step and the other on the platform, and in act of getting on to the platform, the car started, and she struck her knee against the step. There was a verdict for the defendant, and upon motion by the plaintiff for a new trial, the verdict was set aside; from the order granting a new trial, the defendant appealed.

A careful examination of that case will show that the only question raised for determination by the court was, whether on the evidence there was raised a question of fact for submission to the jury. The court, in the course of its opinion (p. 608), said:

“The mere fact of starting a car before a passenger has taken his seat is not negligence *per se*. Common experience shows that it is the general custom to start street cars before passengers are seated, and the progress of a car in a great city would be slow indeed if the law absolutely forbade that practice. But whilst it is not positively unlawful to do so under any circumstances, yet it is unlawful to do so under all circumstances, and whether or not it is negligence to do so in a particular case is a question of fact in the light of the circumstances. If, for example, a passenger attempted to get on a car in the position the plaintiff says she was, were a cripple on crutches, could anyone say that the conductor would be justified in starting the car until the passenger had reached a place of reasonable safety? The condition of the plaintiff on crutches, and that of an old woman of unwieldly size may differ in degree, but not in kind.”

From a careful examination of this case, it would seem to be in accord with the cases cited in support of the contention of the appellee to the effect that there must be something out of the ordinary in the condition of the passenger to indicate to the servant of the defendant that a higher degree of care must be exercised in starting the car, before it can be said to be negligence in starting the car, while the passenger is on the platform.

The other cases cited on the brief of the appellant deal purely with questions of pleading; these cases holding in effect that where there are general allegations of negligence in a declaration they are held to be good against a general demurrer.

It is, of course, recognized that where a declaration simply contains general allegations of negligence, a demurrer to such a declaration can not be sustained. Of course, the demurrer necessarily admits the allegations of the declaration well pleaded. This does not mean that the demurrer admits the conclusions of the pleader, but only goes to the extent of admitting facts alleged in the declaration, which are said to constitute the negligence complained of. In the case at bar, we can not conceive how the question as to the generality of the charge of negligence can arise. If the declaration contained only general allegations of negligence, undoubtedly the defendant could not successfully demur to it, as his remedy would be to file a motion for a bill of particulars to require the pleader to make the allegations of negligence more specific. We can not see how such a question can arise in this case. There are no general allegations of negligence in this declaration. The allegation of negligence is specific, in that the appellant charges that while she was on the platform of the car, the defendant started the car suddenly. The sudden starting of the car, therefore, is the specific allegation contained in the

declaration which the appellant charges to be the negligent act.

It is respectfully submitted that the declaration in this case does not allege negligence on the part of the defendant, constituting a cause of action, and that the judgment of the lower court sustaining the demurrer should be affirmed.

Respectfully submitted.

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